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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 915

WILLARD HORACE COLSON, *Petitioner*

v.

STATE OF NORTH CAROLINA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

The petitioner, Willard Horace Colson, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina, entered in the above entitled case on October 21, 1968.

OPINION BELOW

The opinion of the Supreme Court of the State of North Carolina is recorded at 274 N.C. 295 — S.E. 2d —.

JURISDICTION

The judgment of the Supreme Court of North Carolina was made and entered on October 21, 1968, and a copy thereof is appended to this petition as Exhibit 1. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

1. Whether it is a denial of the petitioner's rights under the Fourteenth and Fourth Amendments to the Constitution of the United States in a state proceeding, for police officers, several hours prior to the arrest of the petitioner, while the petitioner was highly intoxicated, smelling of alcohol and in a staggering condition, to carry the petitioner to the police station, and seeing some blood on petitioner's undershirt thereupon asked petitioner if they might see the remainder of his underclothes, which garments were not in view of the officers at the time, and thereby gain the view and possession of the petitioner's undershorts and all of his apparel being worn by him at the time, and for the State Court to permit the petitioner's clothing, including his undershorts, to be used in evidence against the petitioner?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The petitioner, Willard Horace Colson, was indicted on a capital bill of indictment for murder in the first degree, and he was tried upon said bill charging with the murder of his wife, Kathren Ralph Colson, on August 3, 1967. The Solicitor sought a verdict of guilty of murder in the second degree or manslaughter as the evidence might disclose. The jury convicted the petitioner of manslaughter, and a prison sentence of 12 to 15 years was imposed by the Trial Court. The petitioner appealed to the Court of Appeals (intermediate appellate court) where his conviction and sentence was upheld, 1 N.C. App. 339.

The petitioner appealed from the judgment of the Court of Appeals upholding his conviction and sentence, to the Supreme Court of North Carolina, petitioner alleging involvement of a substantial constitutional question by reason of an illegal search of his person and seizure of his clothing while he was highly intoxicated, smelling of alcohol and in a staggering condition.

The evidence in the trial below tended to show that petitioner's wife came to her death as a result of a penetrating wound in her chest at her home in Elizabeth City on the night of August 3, 1967. Police officers found the deceased had been wounded in the chest by some penetrating instrument. She was dead and her body was cold.

The petitioner arrived at the house at approximately 1:30 A.M. just as the body of his deceased wife was being placed in a hearse. He was highly intoxicated, smelled of alcohol and was staggering.

The petitioner was thereupon carried to the police station and the petitioner, due to his highly intoxicated condition, had to be assisted out of the police car and he fell going into the police station. While the petitioner was in this highly intoxicated condition, the police officers took a statement from him and, the petitioner opened his shirt to exhibit a scar on his stomach at which time the officers saw blood on his undershirt. Thereupon, the officers asked the petitioner if they might see the rest of his underclothes which were not in their view at the time. The petitioner, while in said highly intoxicated condition, then exposed his undershorts to view at which time the officers observed blood on them. The petitioner's clothing, including his undershorts, were taken from him by the police officers.

While the foregoing occurred, the petitioner had not been placed under arrest. He was not arrested until a warrant was obtained sometime between 8:30 and 9:00 A.M. on the morning of August 4, 1967.

Over objection of the petitioner, his clothing, including his undershorts, were admitted into evidence against him by the Trial Court, said clothing having been taken from him prior to his arrest, as aforesaid, and the officers having asked him to expose his undershorts to view while he was highly intoxicated, smelling of alcohol and in a staggering condition, and the officers did not resort to the issue and use of a search warrant.

The question sought to be reviewed was raised during the Trial by timely objection and exception and

carried forward and argued in both the Court of Appeals and the Supreme Court of North Carolina. See Assignment of Error number 1, Record page 20 with reference to State's Exhibits 18, 19, 20 and 21, as shown by Exception numbers 15, 16, 17, and 18, Transcript pages 37, 38, 39, 40 and 41.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the Supreme Court of North Carolina has decided a federal constitutional question of great importance, which has not been specifically ruled upon by this Court, and the disposition of this question was a denial to the petitioner of his fundamental rights under the Fourteenth and Fourth Amendments to the Constitution of the United States and was contrary to the theory and reasoning of decisions of this Court.

In *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S.Ct. 1684 (1961), this Court held that all evidence obtained by searches and seizures in violation of the Fourth Amendment prohibition of the Constitution is inadmissible in a State Court by reason of the due process clause of the Fourteenth Amendment. Thus evidence unconstitutionally obtained is excluded in the State Court, and the standard of reasonableness is the same under the Fourth and Fourteenth Amendments. The State Courts must conform to the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that amendment.

Several factual matters should be considered as bearing upon the reasonableness of the conduct of the police officers in the instant case:

(1) The petitioner at the time in question was highly intoxicated, smelling of alcohol and in a staggering condition.

(2) The alleged unreasonable search and seizure occurred 6 or 7 hours prior to the arrest of the petitioner.

(3) The police officers asked the petitioner to expose his undershorts to view, at a time when the petitioner was unable to make any intelligent decision.

This case must also be considered in the light of the principles developed in *Miranda* v. *Arizona,* 384 U.S. 436 (1966). This relevance of the *Miranda* rules to the Fourth Amendment was anticipated by a federal district court in *United States* v. *Blalock,* 255 F. Supp. 268 (D.C. Pa. 1966). There it was decided that in a search and seizure case, where the Government contends that the defendant waived his Fourth Amendment rights by giving a voluntary consent to search, the duty must be imposed upon the officers who conduct the search to warn the individual of his right to counsel, his right to remain silent, and his right to refuse a warrantless search.

> The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The Requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd . . . To require law enforcement officers to advise the subjects of investigation of their right to insist on a search warrant would impose no great burden, nor would it unduly or unnecessarily impede criminal investigation. 255 F. Supp. at 269-270.

In *Bumper* v. *North Carolina,* —— U.S. ——, —— S.Ct. ——, 20 L. Ed. 2d 797, this Court said:

> "When a prosecutioner seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given."

In the instant case, there was no finding made by the Trial Court that the petitioner was able to intelligently, freely and voluntarily make a decision when the officers asked him to expose his undershorts to view. It affirmatively appears on the record and the Supreme Court of North Carolina stated in its statement of facts that "he was highly intoxicated, smelled of alcohol and was staggering." Consequently, the only reasonable conclusion to be drawn from this condition of the petitioner is that he was mentally incapable of making such a decision so as to consent voluntarily to a search and seizure and waive his constitutional rights.

The Supreme Court of North Carolina states in its statements of facts that the petitioner "voluntarily exposed his undershorts to view", but at the same time, the Supreme Court of North Carolina says "he was highly intoxicated, smelled of alcohol and was staggering." Further nowhere does the Supreme Court make reference to the condition of the petitioner's intelligence brought on by his intoxicated condition at the time the officers in effect required him to expose and surrender his undershorts. Voluntary consent requires sufficient intelligence to appreciate the act as well as the consequence of the act agreed to.

The Court's attention is respectfully invited to 47 Am. Jur., Searches and Seizures, Section 53, where it is stated:

> "The constitutional guaranties against all unreasonable searches or seizures secures every citizen against a search of his person not plainly authorized by some law. A search of the person, however, without a warrant, in connection with a lawful arrest, and the taking from the arrested person the instruments found in his possession

> which were used in connection with the crime is not an unreasonable search or an illegal seizure. No search of the person or seizure of any article found thereon can be made on *mere suspicion* that the person searched is violating the law, or without a search warrant, unless and until the alleged offender is in custody under a *warrant of arrest* or *shall be lawfully arrested* without a warrant as authorized by law.

In 79 C.J.S., Searches and Seizures, Section 67a, the following is stated:

> "The right of search without a warrant is limited to a search contemporaneous with, or subsequent to, an arrest, and does not authorize a search without a warrant *prior to an arrest,* in order to secure evidence to support a future arrest."

In 6 C.J.S., Arrest, Section 18th, it is stated:

> "In order to justify a search and seizure as an incident to an arrest, however, a lawful arrest is essential; and it is also necessary that the search and seizure occur after, and as an incident to, *such arrest,* since a search and seizure which precedes an arrest is ordinarily considered unlawful, as is also a search and seizure to which an arrest is merely incidental."

In *State* v. *Little,* 270 N.C. 234 — S.E. 2d —, an excellent statement of the significance of consent voluntarily and intelligently given is set forth as follows:

> "Implicit in the very nature of the term 'consent' is the requirement of voluntariness. To be voluntary the consent must be 'unequivocal and specific', and 'freely and *intelligently* given.' Judd v. U.S., 89 U.S. App. D.C. 64, 66, 190 F 2d 649, 651. To be voluntary, it must be shown that the waiver was free from coercion, duress or fraud, and not given

merely to avoid resistance. 79 CJS, Searches and Seizures, Sec. 62b, p 820. But such a waiver and consent a defendant relinquishes the protection of the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures, United States v. Smith, 308 F 2d 657, 663, cert. den. 372 US 906, 9 L Ed 2d 716 (1963)."

"The burden of proof is upon the State to establish by clear and positive testimony that consent was so given. Judd vs. US, supra; State vs King, supra; 79 CJS, Searches and Seizures, Sec. 62a, p 819."

It is respectfully submitted that the language of this Court in *Taylor* v. *U. S.*, 286 U.S. 1, 52 S.C. 466 76 L. Ed. 951, where the officers saw cardboard boxes and smelling the odor of whiskey coming from a garage, proceeded to break open the door and go in without a warrant is applicable. In condemning that search and seizure, this Court said that the officers "had abundant opportunity to obtain a warrant and to proceed in an orderly way even after the odor had emphasized their suspicion; there was no probability of natural change in the situation during the time necessary to secure such warrant."

In the instant case, the officers first of all should have waited until the petitioner recovered from his mentally incompetent condition by reason of intoxication before requiring him to make significant decisions pertaining to his constitutional rights, particularly regarding whether he would or would not expose his undershorts to view. If the officers had allowed the petitioner to make such mental recovery, then if he refused to expose his undershorts to view they could readily obtain the necessary warrant without prejudicing the investigative process.

Courts indulge every reasonable presumption against a waiver by a defendant charged with crime of fundamental constitutional rights, and do not presume acquiescence in their loss. *Glasser* v. *U.S.,* 315 U.S. 60, 86 L. Ed. 680; *Johnson* v. *Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 146 A.L.R. 357.

In *Johnson* v. *Zerbst, supra,* the Court said:

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

In *Carnley* v. *Cochran,* 369 U.S. 506, the Court held (analogous to instant case):

> ". . . The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but *intelligently and understandingly* rejected the offer. . . ." (emphasis added)

The Carnley quotation is approved in *Miranda* v. *Arizona,* 384 U.S. 436, which adds the following:

> ". . . A heavy burden rests on the Government to demonstrate that the defendant *knowingly* and *intelligently* waived his (constitutional rights). . . . This Court had always set high standards of proof for the waiver of constitutional rights. . . ." (emphasis added)

CONCLUSION FOR THE REASONS SET FORTH ABOVE

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX

Exhibit I

IN THE SUPREME COURT OF NORTH CAROLINA

Fall Term, 1968

No. 1--Pasquotank

STATE OF NORTH CAROLINA

v.

WILLARD HORACE COLSON

Appeal by defendant from decision of the Court of Appeals upholding judgment of Cohoon, J., at the November 1967 Criminal Term of Pasquotank County Superior Court.

Defendant was tried upon a bill of indictment charging him with the murder of his wife Kathren Ralph Colson on 3 August 1967. The solicitor sought a verdict of guilty of murder in the second degree or manslaughter, as the evidence might disclose. The jury convicted defendant of manslaughter, and a prison sentence of 12 to 15 years was imposed by the court. Defendant appealed to the Court of Appeals where his conviction and sentence was upheld, 1 N.C. App. 339.

The case is now before us on appeal, defendant alleging involvement of substantial constitutional questions by reason of (1) an illegal search of his person and seizure of his clothing; and (2) an illegal search of his house and seizure of an empty Jacquin's Vodka bottle.

The State's evidence—defendant offered none—tended to show that defendant's wife was stabbed to death at her home in Elizabeth City on the night of 3 August 1967. Police officers went to the home in response to a telephone call from defendant's son received at approximately 12:30 a.m. on 4 August 1967. They were admitted by the son Willard Colson, Jr., and found the deceased in a slumped position on a settee in the living room with her head on the armrest.

Examination revealed a stab wound in her chest which penetrated the heart and large vessels leading to the lungs. A search of the house at that time revealed a butcher knife approximately twelve inches long on the counter in the kitchen with blood on the blade. Blood spots were also found on the bed clothing and sheets in the bedroom and on the rugs.

Defendant arrived at the house at approximately 1:30 a.m. just as the body of his deceased wife was being placed in a hearse. He was highly intoxicated, smelled of alcohol and was staggering. He walked up and asked the chief of police: "Chief, what's wrong? Has she had a heart attack?" The chief of police replied: "No, she did not have a heart attack; she has been stabbed." The defendant then asked: "What with, a butcher knife?" During this conversation defendant was not in custody and was not being questioned by the officers. The chief of police then requested defendant and his son to accompany him to the police station, and they did so voluntarily.

Defendant was given the *Miranda* warning at the police station, after which he told the officers he had gotten off work and arrived home about 5 o'clock p.m. on the preceding afternoon; that his wife had been drinking and provoked an argument, though there was no argument between them; that he left the house about 6 p.m., at which time his wife was lying sprawled out on the settee; that he went to the liquor store and purchased a pint of liquor and just drove around drinking it; that the butcher knife found in the kitchen of his home was his, but he expressly denied that he had ever cut his wife or that he knew who had done it.

Following the foregoing statement and during a general conversation at the police station, defendant offered to show the officers a scar on his stomach. When he opened his shirt, the officers saw blood on his undershirt and asked defendant if they might see the rest of his underclothes.

Defendant voluntarily exposed his undershorts to view at which time blood was observed on them. When he was asked by the officers and by his son how the blood got on his underclothing, defendant did not answer.

A serologist testified that the blood of the deceased was type "AB" and the blood on defendant's undershirt and undershorts was type "AB", while defendant's blood was type "O'. This witness further stated that he had made an examination of the blood spots on the garments of the deceased, on sheets in the bedroom, and on the butcher knife, and all were found to be type "AB".

Defendant's clothing—T shirt, undershorts, dungarees and shirt—was taken from him by the police between 2:00 and 2:30 a.m. on 4 August 1967. At this time he was being detained at the police station for questioning but had not yet been placed under arrest. A warrant was not obtained until sometime between 8:30 and 9:00 a.m. on the morning of 4 August 1967, as soon as a magistrate was available to issue it.

The defendant remained at the police station from the time he arrived at approximately 1:30 a.m. until about 9:30 a.m. the same morning when he accompanied the officers on a return to his home to see if any other evidence which might have been overlooked the previous night could be located. The officers requested permission to enter the home for that purpose, and defendant, offering no objection, entered with them. Upon making a further search, an empty pint Jacquin's Vodka bottle was found under a chest of drawers in the bedroom. An employee of the County ABC Board testified that defendant bought a pint of vodka from him on the evening of 3 August 1967 between 7:15 and 8:00 p.m., and identified the bottle found in the bedroom as having been sold from his register on 3 August 1967. The bottle, and testimony concerning its discovery, was admitted into evidence over objection by defendant.

Defendant's motion for nonsuit at the close of the State's evidence was overruled. The jury found defendant guilty of manslaughter, and from a judgment of imprisonment defendant appealed to the Court of Appeals, where his conviction and sentence was upheld, and then to this Court assigning errors as noted in the opinion.

RUSSELL E. TWIFORD, O. C. ABBOTT and JOHN S. KISIDAY, Attorneys for Defendant Appellant.

T. W. BRUTON, Attorney General, and BERNARD A. HARRELL, Assistant Attorney General, for the State.

HUSKINS, J. Article IV, Section 10 of the Constitution of North Carolina confers upon the Supreme Court "jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference," authorizes establishment of the Court of Appeals with such appellate jurisdiction as the General Assembly may provide, and empowers the General Assembly by general law to provide a proper system of appeals.

In the exercise of its constitutional authority, the General Assembly created the North Carolina Court of Appeals effective January 1, 1967, as a part of the appellate division of the General Court of Justice, and defined the appellate jurisdiction of the Supreme Court and the Court of Appeals in these words: "The Supreme Court and the Court of Appeals respectively have jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice . . . in accordance with the system of appeals provided in this article." G.S. 7A-26. See also G.S. 7A-5, 7A-16.

The General Assembly then enacted a system of appeals providing, *inter alia,* that an appeal may be taken as a matter of right to the Supreme Court from any decision of the Court of Appeals rendered in a case which directly involves a substantial question arising under the Constitution of the United States or of this State. G.S. 7A-30(1).

In the case before us, defendant appeals to the Supreme Court, allegedly as of right, on the ground that a substantial constitutional question is involved. The initial question, therefore, for the Court to decide is: Does the case present a substantial constitutional question; and, if so, does the Supreme Court consider only the constitutional questions and nothing else, or may it pass upon all assignments of error allegedly committed by the Court of Appeals and properly brought forward for review? In other words, what is the scope of review upon an appeal as of right? This is a matter of first impression in North Carolina due to recent changes in our court structure. Decisions in other jurisdictions having intermediate appellate courts are only obliquely authoritative due to constitutional and statutory provisions at variance with ours.

Intermediate appellate courts exist in sixteen states. In some, the constitution or statutes provide for a direct appeal from the trial court to the highest court in cases involving a substantial constitutional question, by-passing the intermediate appellate court. See Burke v. State, 205 Ga. 520, 54 S.E. 2d 348; Glos v. People, 259 Ill. 332, 102 N.E. 763; Capitol Indemnity Insurance Co. v. State, 126 Ind. App. 535, 134 N.E. 2d 822; New Orleans v. Vinci, 153 La. 528, 96 So. 110, 28 A.L.R. 1382; Fish v. Chicago R. I. & P. Ry., 263 Mo. 106, 172 S.W. 340; Going v. Going, 148 Tenn. 522, 256 S.W. 890, 31 A.L.R. 633. In "by-pass" states, involvement of a substantial constitutional question is jurisdictional, and the highest court is powerless to act absent a constitutional issue.

The Missouri Constitution, Article V, Section 3, provides: The Supreme Court shall have exclusive appellate jurisdiction in all cases involving the construction of the Constitution of the United States or of this state . . . ." Hence, the Supreme Court of Missouri in Taylor v. Dimmitt, 336 Mo. 330, 78 S.W. 2d 841, 98 A.L.R. 995, said: "Our jurisdiction rests upon the constitutional issues in-

volved. Having jurisdiction, this court will determine the whole case, irrespective of the issue upon which the case may turn."

In Pennington v. Farmers' and Merchants' Bank, 144 Tenn. 188, 231 S.W. 545, 17 A.L.R. 1213, plaintiff sued to recover the value of a $1,000 bond which had been lodged in the bank's vault for safekeeping and stolen by burglars. The trial court nonsuited under a statute which provided that the bank shall not be liable for loss by theft, robbery or fire. Plaintiff, contending the statute was unconstitutional for that it was arbitrary and unreasonable and discriminatory in favor of banks, appealed directly to the Supreme Court alleging involvement of a constitutional question. The court said: "We do not think this legislation is applicable to the case before us, and therefore have no occasion to pass upon the constitutionality of the enactment. Nevertheless, as the constitutional question was fairly raised on the record, we retain jurisdiction of the case and will dispose of the other questions."

In Indiana, a statute provides that jurisdiction of an appeal shall be in the Supreme Court, rather than the intermediate appellate court, if a constitutional question is involved. The Indiana Supreme Court said: "But, in order for the Supreme Court to have jurisdiction of such a case, the constitutional question must actually be involved and be properly presented. It is not sufficient that it merely be alleged to be involved. If an allegation only was sufficient, it would be possible to appeal every case . . . to the Supreme Court or to obtain the transfer thereto of any case pending in the Appellate Court." Pivak v. State. 202 Ind. 417, 175 N.E. 273, 74 A.L.R. 406.

Article VI, Section 5, of the Constitution of Illinois provides, *inter alia*, that "appeals from the final judgments of circut courts shall lie directly to the Supreme Court as a matter of right only . . . (b) in cases involving a question arising under the Constitution of the United States or of

this State. . . . Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right only (a) in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court. . . ."

In People v. Perry, 34 Ill. 2d 229, 215, N.E. 2d 229, defendant was convicted in the trial court and appealed directly to the Supreme Court alleging that the trial court erred in refusing to suppress evidence obtained by an unreasonable search and seizure in violation of his rights under the State and Federal Constitutions. The court said: "And while the latter contention serves to invest us with jurisdiction of the direct appeal, the constitutional question it presents need not be decided since in our opinion it is unnecessary to do so." The court then considered other assignments involving non-constitutional questions and reversed the judgment of the trial court on the ground that defendant had not been proven guilty beyond a reasonable doubt.

In "double appeal" states, including North Carolina and New Jersey, cases involving a substantial constitutional question are appealable in the first instance to the intermediate appellate court and then to the highest court as a matter of right. G.S. 7A-30(1); New Jersey Constitution, Article 6, Section 5.

In New Jersey, if the alleged constitutional question is frivolous, the appeal will be dismissed. Klotz v. Lee, 21 N.J. 148, 121 A. 2d 369; State v. DeMeo, 20 N.J. 1, 118 A. 2d 1, 56 A.L.R. 2d 905. On the other hand, if a substantial constitutional question is *alleged and shown*, the Supreme Court may then consider all questions properly presented. ". . . [T]he constitutional question should be a real and not merely a superficial one. Consequently this court determined in the early days of the new system that a constitutional question . . . must be 'substantial', Starego v. Soboliski, 11 N.J. 29, 32, 93 A. 2d 169 (1952), cert. den.

345 U.S. 925, 73 S. Ct. 784, 97 L. ed. 1356 (1953), and not 'merely colorable', State v. Pometti, 12 N.J. 446, 450, 97 A. 2d 399 (1953)." Tidewater Oil Co. v. Mayor and Council of Carteret, 44 N.J. 338, 209 A. 2d 105 (1965). The constitutional question relied upon must not have already been the subject of a conclusive judicial determination. Tidewater Oil Co. v. Mayor and Council of Carteret, supra; State v. Pometti, supra. See Camden County v. Pennsauken Sewerage Authority, 15 N.J. 456, 105 A. 2d 505 (1954); Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 120 A. 2d 24 (1956); Fifth Street Pier Corp. v. City of Hoboken, 22 N.J. 326, 126 A. 2d 6 (1956).

In 4 Am. Jur. 2d, Appeal and Error, § 14, we find this language: "For a case to be appealable as involving a constitutional question, the question must be actually involved in the case and must be properly presented; it is not sufficient that it merely be alleged."

It will be noted from the foregoing citations that in jurisdictions having intermediate appellate courts the appellant is invariably required to *allege and show* the involvement of a substantial constitutional question in order to gain entrance to the higher appellate court as a matter of right. Mere assertion of constitutional involvement will not suffice. This is true not only in jurisdictions employing a direct appeal by-passing the intermediate court but also in states employing the provision for double appeals as of right when a substantial constitutional question is involved. Once involvement of the basic question is established, however, the higher appellate court may then pass upon all assignments of error allegedly committed by the intermediate appellate court and properly brought forward for review.

It now becomes our duty to determine the scope of review upon an appeal as of right under the Constitution and laws of North Carolina. Brief historical reference reveals

that the 1963 General Assembly by joint resolution created the Courts Commission and charged it with the duty of preparing and drafting legislation necessary for the full and complete implementation of Article IV of the Constitution. In establishing the North Carolina Court of Appeals, defining its jurisdiction, and providing a system of appeals, the Courts Commission was guided, *inter alia*, by the basic principle that there should be one trial on the merits and one appeal on the law, as of right, in every case. The Commission sought to avoid double appeals as of right, except in the most unusual cases, the importance of which may be said to justify a second review. See Report of the Courts Commission to the 1967 General Assembly, p. 4. That report depicts the legislative intent with respect to appellate jurisdiction in the following language on pages 10 and 11:

> "In the beginning it must be understood that, in speaking of the jurisdiction of the Court of Appeals, we are necessarily also dealing with the jurisdiction of the Supreme Court. Under our pre-1965 Constitution, all appellate jurisdiction above the trial division was vested in the Supreme Court, and such jurisdiction as is now to be given to the Court of Appeals is necessarily taken from the Supreme Court. However, the exercise of jurisdiction given to the Court of Appeals may still be subject to review by the Supreme Court, and hence it is possible to speak with accuracy and clarity only of the jurisdiction of the *Appellate Division*, or of its two separate branches, the Court of Appeals *and* the Supreme Court.
>
> "The 1965 amendment to the Judicial Article of the Constitution provides that the Court of Appeals shall have such appellate jurisdiction as the General Assembly may provide. This must be read in conjunction with the Supreme Court's power, set out in Art. IV, Sec. 10(1) '. . . to review upon appeal any decision of the courts below, upon any matter of law or legal

> inference,' and of the grant to the General Assembly in Art. IV, Sec. 10(5) [now (6)], to '. . . provide a proper system of appeals.' Construing these sections together, it is clear that the Supreme Court is empowered directly by the Constitution (though not compelled by it) to review any and all cases, and that under the Constitution the General Assembly may assign to the Court of Appeals such appellate jurisdiction as it sees fit. Thus, the only constitutional limitations on making any conceivable division of appellate labors and functions between the two are the limitations implicit in the fact that one is higher than the other in the hierarchy of the General Court of Justice."

A Bill embracing these philosophies was enacted into law as Chapter 108 of the 1967 Session Laws.

Construing the legislative intent and mindful of the New Jersey system to which we are kin, we hold that an appellant seeking a second review by the Supreme Court as a matter of right on the ground that a substantial constitutional question is involved must *allege and show* the involvement of such question or suffer dismissal. The question must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial determination. Mere mouthing of constitutional phrases like "due process of law" and "equal protection of the law" will not avoid dismissal. Once involvement of a substantial constitutional question is established, this Court will retain the case and may, in its discretion, pass upon any and all assignments of error, constitutional or otherwise, allegedly committed by the Court of Appeals and properly presented here for review.

Defendant assigns as error the admission into evidence of the clothing he was wearing on the night his wife was killed (T shirt, undershorts, dungarees and shirt). These

items were removed from his person about 2:00 a.m. on the morning of 4 August 1967 at the police station while defendant was determined during police investigation but prior to his actual arrest. Defendant contends the taking of his clothing was an unlawful search and seizure, violative of the Fourth and Fifth Amendments to the Federal Constitution and Article I, Section 15, of the Constitution of North Carolina. The State contends no search was involved, and the Court of Appeals so held.

Under common-law rules the admissibility of evidence was not affected by the means, lawful or otherwise, used in obtaining it, Olmstead v. United States, 277 U.S. 438, 72 L. ed. 944, 48 S. Ct. 564; State v. McGee, 214 N.C. 184, 198 S.E. 616; and, if the evidence was otherwise relevant and competent, it was generally admissible unless its admission violated the constitutional rights of the person against whom it was offered or contravened the statutory law of the jurisdiction. 29 Am. Jur. 2d, Evidence § 406. Notwithstanding such general common-law practice, the Supreme Court of the United States developed an exclusionary rule applicable in the federal courts whereby evidence that had been obtained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure was excluded. U. S. v. Blue, 384 U.S. 251, 16 L. ed. 2d 510, 86 S. Ct. 1416. This rule was first laid down in Weeks v. United States, 232 U.S. 383, 58 L. ed. 652, 34 S. Ct. 341 (1914). There, the Court held that evidence obtained by federal officers in an illegal search and sesizure violated defendant's constitutional rights under the Fourth Amendment and was inadmissible, but stated that the Fourth Amendment reached only the federal government and its agencies and did not apply to individual misconduct of state officers not acting under federal authority. Thus, evidence admittedly obtained by state or local officers by illegal search and seizure continued to be competent in state courts if otherwise relevant, unless prohibited by statutory law of the forum.

In Wolf v. Colorado, 338 U.S. 25, 93 L. ed. 1782, 69 S. Ct. 1359 (1949), the Court declined to extend the exclusionary rule adopted in *Weeks* to the states by the due process clause of the Fourteenth Amendment, stating that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. However, twelve years later, in Mapp v. Ohio, 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684 (1961), it was held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." Since *Mapp*, the states are no longer free to adopt or reject at will the exclusionary rule as a means of enforcing the Fourth Amendment in state courts. Evidence unconstitutionally obtained is excluded in both state and federal courts as an essential to due process—not as a rule of evidence but as a matter of constitutional law.

The federal exclusionary rule enunciated in *Weeks* became statutory law in North Carolina long before *Mapp* by enactment of Chapter 339 of the 1937 Session Laws as amended by Chapter 644 of the 1951 Session Laws, codified as G.S. 15-27, which provides in pertinent part that no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action. Evidence is not rendered incompetent under the foregoing section unless it was obtained (1) in the course of a search, (2) under conditions requiring a search warrant, and (3) without a legal search warrant. State v. Coffey, 255 N.C. 293, 121 S.E. 2d 736; State v. Stevens, 264 N.C. 737, 142 S.E. 2d 588.

So, in the case before us, if the circumstances under which defendant's clothing was taken required the issuance of a search warrant, the seizure was unlawful and the evidence inadmissible. Otherwise not.

The Constitution does not prohibit all searches and seizures but only those which are unreasonable. Carroll v. United States, 267 U.S. 132, 69 L. ed. 543, 45 S.Ct. 280; Elkins v. United States, 364 U.S. 206, 4 L. ed. 2d 1669, 80 S. Ct. 1437. An unreasonable search has been defined as "an examination or inspection without authority of law of one's premises or person, with a view to the discovery of . . . some evidence of guilt, to be used in the prosecution of a criminal action. 47 Am. Jur., Searches and Seizures § 52.

An individual may waive any provision of the Constitution intended for his benefit, including the immunity from unreasonable searches and seizures; and where such immunity has been waived and consent given to a search of his person, an individual cannot thereafter complain that his constitutional rights have been violated. If one voluntarily permits or expressly invites and agrees to the search, being cognizant of his rights, such conduct amounts to a waiver of his constitutional protection. 47 Am. Jur., Searches and Seizures § 71 and cases cited; State v. McPeak, 243 N.C. 243, 90 S.E. 2d 501; State v. Moore, 240 N.C. 749, 83 S.E. 2d 912.

Furthermore, under circumstances requiring no search, the constitutional immunity never arises. This principle is aptly stated in 47 Am. Jur., Searches and Seizures § 20, as follows: "Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand. See State v. Giles, 254 N.C. 499, 119 S.E. 2d 394; Satte v. Coffey, 255 N.C. 293, 121 S.E. 2d 736; and State v. Kinley, 270 N.C. 296, 154 S.E. 2d 95.

Applying these principles to the evidence regarding defendant's clothing, we are of the opinion that the circum-

stances prevailing at the police station when defendant's clothing was taken required no search warrant. There was no need to search. As stated in the opinion of the Court of Appeals, 1 N.C. App. 339 at 343, 161 S.E. 2d 637, 640, ". . . the bloody underclothing was not discovered by the police officers as a result of any search being made by them of defendant's person. Rather, the defendant voluntarily exhibited his underclothing to them while, for whatever reasons of his own, he was engaged in showing them scars upon his body. When the incriminating article is in plain view of the officers or is revealed by the voluntary act of the defendant, no search is necessary and the constitutional guaranty does not apply.

Defendant's Fifth Amendment privilege against self-incrimination was not violated by seizure of his clothing. Clothing, like identifying physical characteristics such as blood samples, fingerprints, hair, the body itself, is outside the protection of the Fifth Amendment. State v. Wright, 274 N.C. 84, 161 S.E. 2d 581.

In State v. Gaskill, 256 N.C. 652, 124 S.E. 2d 873, defendant claimed the taking of his clothing for chemical analysis, followed by testimony that the stains found on them were human blood stains, constituted self-incrimination forbidden by Article I, Section 11, of the Constitution of North Carolina and the Fifth Amendment to the United States Constitution. The Court said: "This contention runs counter to State and Federal decisions. No constitutional rights were invaded when the officer required defendant to surrender for examination and analysis the clothing worn by him at the time the crime was alleged to have been committed." See State v. Tippett, 270 N.C. 588, 155 S.E. 2d 269 (1967).

It follows that seizure of defendant's clothing did not violate his rights under the Fourth or Fifth Amendments to the United States Constitution or under Article I, Sec-

tion 15, of the Constitution of North Carolina. Defendant's first Assignment of Error is overruled.

Defendant assigns as error certain questions put to witnesses by the trial judge during the trial. The Court of Appeals found no merit in this assignment, and we agree. "It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so. . . ." State v. Horne, 171 N.C. 787, 88 S.E. 433. Such examinations should be conducted with care and in a manner which avoids prejudice to either party. If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the "impression of judicial leaning," they violate the purpose and intent of G.S. 1-180 and constitute prejudicial error. State v. McRae, 240 N.C. 334, 82 S.E. 2d 67; Andrews v. Andrews, 243 N.C. 779, 92 S.E. 2d 180; State v. Peters, 253 N.C. 331, 116 S.E. 2d 787; State v. Lea, 259 N.C. 398, 130 S.E. 2d 688. Even so, this Court has said that "judges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice. It is entirely proper, and sometimes necessary, that they ask questions of a witness so that the 'truth, the whole truth, and nothing but the truth' be laid before the jury." *Eckhout* v. Cole, 135 N.C. 583, 47 S.E. 655. We have examined the questions by the judge to which exception was taken, and in our opinion no prejudice resulted from them. The questions served only to clarify and promote a proper understanding of the testimony of the witnesses and did not amount to an expression of opinion by the judge. State v. Carter, 233 N.C. 581, 65 S.E. 2d 9; State v. Grundler, 251 N.C. 177, 111 S.E. 2d 1.

The statutory duties of coroners are set forth in G.S. 152-7. Defendant requested the trial judge to instruct the jury relative to these duties and assigns as error the approval by the Court of Appeals of his refusal to do so.

These duties are collateral to the issue of defendant's guilt or innocence, and no instruction concerning them was required. Furthermore, the whole of the coroner's evidence, both directed and cross examination, was elicited without a single objection or exception. If this assignment had merit, which it hasn't, it has no foundation to support it. Only exceptive assignments of error are considered. Rule 19(3), Rules of Practice in the Supreme Court, 254 N.C. 783 at 797; Darden v. Bone, 254 N.C. 599, 119 S.E. 2d 634; State v. Strickland, 2545 N.C. 658, 119 S.E. 2d 781. This is a perfect example of inconsequential assignments which the Supreme Court will not discuss in future appeals.

Defendant asserts prejudicial error in allowing State's witness Boyce to testify concerning the finding of a vodka bottle in the bedroom, as shown by Exceptions 28 and 29 appearing in the transcript on pages 102, 103 and 108, alleging the bottle to be the tainted fruit of an illegal search. This assignment is not discussed in appellant's brief filed in the Court of Appeals, and no reason or argument is cited in support of it. Rule 28, Rules of Practice in the Court of Appeals, provides in pertinent part that "exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." That court apparently so considered it since evidence concerning the vodka bottle was discussed in its opinion only in connection with a different assignment involving the propriety of certain questions asked by the Judge.

Now in this Court for the first time in the appellate division, defendant seeks to inject the constitutionality of the search of the bedroom made by Officer Boyce and others between 9 and 10 a.m. on the morning of 4 August 1967 when an empty Jacquin's Vodka bottle, purchased by de-

fendant at a local ABC store on the previous evening, was found under a chest of drawers. This he cannot do. The Supreme Court reviews the decision of the Court of Appeals for errors of law allegedly committed by it and properly brought forward for consideration.

"The attempt to smuggle in new questions is not approved. Irvine v. California, 347 U.S. 128, 129 [98 L.ed 561, 74 S.Ct. 381]. Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. State v. Jones, 242 N.C. 563, 564, 89 S.E. 2d 129. This is in accord with the decisions of the Supreme Court of the United States. Edelman v. California, 344 U.S. 357, 358 [97 L.ed 387, 73 S.Ct. 293]." State v. Grundler, 251 N.C. 177, 111 S.E. 2d 1. Thus, the new question is not properly before us because it was not raised and passed upon in the Court of Appeals.

Even so, we note that the officers initially entered defendant's home at 12:30 a.m. by invitation of defendant's son and found the dead body of defendant's wife on a settee in the living room. A *partial* investigation at that time resulted in the discovery of a bloody butcher knife, apparently the death weapon, and blood spots on bed clothing, sheets and rugs. The body was removed at approximately 1:30 a.m., and the officers were accompanied to the police station by defendant who was questioned after having been warned of his constitutional rights. Later, between 9 and 10 a.m. on the same day, the officers returned to the home to complete the investigation accompanied by defendant. He was present and consenting when the officers entered the home a second time. When they asked defendant's permission to enter, he offered no objection but entered with them. This was merely a resumption of the initial investigation

at the scene of the crime with defendant's consent and participation. The necessity of a search warrant is not apparent. "It is generally held that the owner or occupant of premises, or the one in charge thereof, may consent to a search of such premises and such consent will render competent evidence thus obtained. Consent to the search dispenses with the necessity of a search warrant altogether." State v. Moore, supra (240 N.C. 749, 83 S.E. 2d 912), citing numerous authorities. See also State v. Little, 270 N.C. 234, 154 S.E. 2d 61; State v. Hamilton, 264 N.C. 277, 141 S.E. 2d 506; Zap v. United States, 328 U.S. 324, 90 L.ed 1477, 66 S.Ct. 1277.

There is substantial evidence of all material elements of the offense. In the decision of the Court of Appeals, we find

NO ERROR.